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No. 90-946

In The

Supreme Court of the United States

October Term, 1990

S & M INVESTMENT CO.,
a California general partnership,

Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY,
a public entity, DOES I through XXX, inclusive,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

1. Did the district and appellate courts correctly interpret the phrase "legal action" as used in Article VI(p) of the Tahoe Regional Planning Compact?

2. Did the district and appellate courts correctly conclude that erroneous oral advice by a Tahoe Regional Planning Agency ("TRPA") employee did not estop TRPA from enforcing Article VI(p) of the Tahoe Regional Planning Compact?

3. Did the district and appellate courts correctly conclude that no genuine issues of material fact existed?

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BRIEF IN OPPOSITION

The Tahoe Regional Planning Agency, Respondent, submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit that was filed on December 12, 1990, by S&M Investment Company, Petitioner.

STATUTE INVOLVED

This case involves Article VI(p) of the amended Tahoe Regional Planning Compact (Public Law 96-551, 94 Stat. 3233, 3248, December 19, 1980) which provides as follows:

> (p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments of this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

STATEMENT OF THE CASE

This case involves the interpretation and enforcement of the Tahoe Regional Planning Compact, an interstate compact between the States of California and Nevada. The Tahoe Regional Planning Compact (P.L. 91-148, 83 Stat. 860, December 19, 1969; Nevada Revised Statutes 277.200; California Government Code Section 66801) ("Compact"), created a bi-state agency, the Tahoe Regional Planning Agency ("TRPA"), to prepare and implement a regional plan for the Lake Tahoe Basin. Lake Tahoe is an alpine lake that straddles the California-Nevada state line. The Tahoe Region has a land area of 324 square miles and an approximate population of 48,000.

The facts of the case are set forth in detail in the Memorandum of Points and Authorities Supporting Defendant Tahoe Regional Planning Agency's Motion for Partial Summary Judgment, pp. 4-7, and are excerpted below for the reader's convenience.

On February 27, 1980 TRPA gave Petitioner, S&M Investment Company ("SMIC"), an 18-month approval to construct an automobile dealership. SMIC also had received a one-year approval, on February 1, 1980, from the California Tahoe Regional Planning Agency ("C-TRPA"), an independent state agency operating pursuant to California Government Code Section 67131.

For reasons of its own, SMIC chose not to start the project in 1980 and instead sought an extension of its C-TRPA approval. In the interim the Tahoe Regional Planning Compact had been amended (P.L. 96-551, 94 Stat. 3233, Dec. 19, 1980) and, pursuant to Article VI(p) of the

amended Compact, SMIC's TRPA approval was automatically extended to December 19, 1983.

C-TRPA delayed action on SMIC's extension request based on a C-TRPA resolution. A one-year extension was ultimately granted on August 7, 1981. Again, for business reasons, SMIC chose not to start construction in 1981 or in 1982. On August 7, 1982 the C-TRPA approval expired.

SMIC allegedly inquired in mid-1982 at TRPA's counter as to the TRPA expiration date for the project. SMIC contends that it was told TRPA approvals were valid for three years and could not be extended under any circumstances. Based on this information, SMIC did not pursue a new C-TRPA approval in 1983 and its TRPA approval expired, by operation of law, on December 19, 1983. TRPA conceded these allegations for purposes of its summary judgment motion in district court.

In 1984 SMIC wrote to TRPA and requested an extension of its 1980 project approval based on Article VI(p) of the amended Compact which provides, in relevant part, that:

> "(p) . . . In computing the three year period [of approval] any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of the project shall not be counted. . . . "

SMIC argued that various C-TRPA regulations constituted legal actions which delayed the project and that SMIC's project was therefore entitled to an extension of its TRPA approval. SMIC further claimed it had been misled to its detriment as to the correct expiration date of its TRPA approval.

SMIC proceeded through TRPA's appeal process and its appeal was denied by the TRPA Governing Board on March 26, 1986. SMIC then filed suit in state court. TRPA removed the action to the U.S. District Court, Eastern District of California. TRPA filed a motion for summary judgment on the counts relating to the statutory interpretation of Article VI(p) of the amended Compact and estoppel against TRPA.

The District Court, Judge Edward J. Garcia presiding, granted TRPA's motion for summary judgment finding that the term "legal action" was unambiguous and referred to litigation, and that erroneous oral advice which contradicted the clear provisions of the amended Compact did not estop TRPA from enforcing the December 19, 1983 expiration of SMIC's project approval.

SMIC filed an appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court decision on both issues (statutory interpretation and estoppel) and denied SMIC's request for rehearing.

During the pendency of the Ninth Circuit appeal, the TRPA Governing Board adopted Resolution 90-8 (Petition, Appendix E) which provided for staff review of certain requests for project extensions under Article VI(p) and required the remainder of such requests to be decided by the TRPA Governing Board. The resolution is procedural and does not define legal action.

SMIC asked the Ninth Circuit to augment the record on appeal to include TRPA Resolution 90-8. During appellate oral argument SMIC claimed the resolution was relevant but the Ninth Circuit denied SMIC's motion to augment the record.

SMIC's statement of the case claims that their property is restricted from further development by TRPA and that the loss of the automobile dealership approval reduced the fair market value of the property by $500,000. Petition, p. 3. These allegations were not part of the district court or appellate court record. TRPA's plan does *not* prohibit further development of SMIC's property. Finally, the inverse condemnation claims in the complaint were voluntarily dismissed by SMIC and not appealed.

REASONS FOR DENYING WRIT

SUMMARY

The petition does not raise important issues of federal law, issues of public importance, conflicts between the circuits, or federal and state courts, or departures from established precedents. The issues raised involve (1) the interpretation of one term in an interstate compact that affects a small geographical area and (2) the review of an estoppel claim with a unique factual situation. Both lower courts arrived at the same conclusions based on established precedent, including U.S. Supreme Court decisions.

1. The Issues Raised by the Petition Are Not Special Or Important.

Supreme Court Rule 10.1 sets forth the character of reasons for granting certiorari. The petition does not raise any of the enumerated reasons.

The importance of the issues raised is judged in relation to the public, not to the individual involved. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Since the Tahoe Regional Planning Compact is a one-of-a-kind statute and has no application outside the Lake Tahoe Basin, its interpretation is of interest only to a limited number of developers and governments in the Tahoe Region. None of the issues presented for review have national or even statewide importance. Finally, C-TRPA was deactivated by California in 1984 and thus SMIC's factual situation is unique and cannot be repeated.

2. The District Court And Appellate Decisions Were Based On Established Precedent.

With respect to the statutory interpretation of Article VI(p) of the amended Compact, both lower courts agreed that "legal action" had an unambiguous meaning. Their analyses were based on longstanding rules of statutory, construction accepted by the Supreme Court. Petition, p.A-5. Since courts are the final determiner of statutory interpretation, TRPA Resolution 90-8 cannot, and was not intended to, change the judicial interpretations.

With respect to the estoppel argument, again, both lower courts agreed that the facts, as a matter of law, did not support the imposition of estoppel against TRPA. Both lower courts based their decisions on a long line of Ninth Circuit cases, and the Supreme Court decision in *Schweiker v. Hansen*, 450 U.S. 785, 788-790 (1981).

3. The Petition Attempts to Relitigate Factual Issues Which Do Not Warrant Further Review

Both lower courts agreed with TRPA that the material facts relating to SMIC's estoppel claim were not in dispute. Petitioner continues to argue that summary judgment was inappropriate because material facts were in dispute. SMIC desires to relitigate the lower courts' findings with respect to the materiality of the facts and the existence of a dispute. However, it is not the facts that SMIC disagrees with; it is the courts' legal interpretation of those facts.

In any event, a petition raising only issues of fact and materiality is not appropriate for review unless other important questions are raised. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted.

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